

Matter of Young

2017 NY Slip Op 30938(U)

March 17, 2017

Surrogate's Court, New York County

Docket Number: 2013-3862/A

Judge: Rita M. Mella

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court

MARCH 17, 2017

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Probate Proceeding, Estate of

HAROLD D. YOUNG

DECISION

File No.: 2013-3862/A

Deceased.
-----X

M E L L A, S.:

The following submissions were considered in determining this motion for summary determination:

<u>Papers Considered</u>	<u>Numbered</u>
Notice of Motion and Affidavit in Support of Cross-Motion for Summary Judgment, with Exhibits, filed July 24, 2015.....	1,2
Affidavit in Support of Cross-Motion for Summary Judgment by Shirley Cahan filed July 24, 2015.....	3
Attorney Affirmation in Opposition, with Exhibits, filed August 3, 2015.....	4
Reply Memorandum of Law in Support of Motion for Summary Judgment, filed August 19, 2015.....	5
Notice of Cross-Motion for Reconsideration of Proponent's Motion for Summary Judgment, filed April 21, 2016.....	6
Affidavit in Support of Cross-Motion, with Exhibits, filed April 21, 2016.....	7
Affirmation of Jason Stern in Opposition, with Exhibits, filed July 25, 2016, Affidavit of Valerie Hume, and Affidavit of Phyllis Brooks.....	8,9,10
Amended Reply Memorandum in Further Support of Motion for Summary Judgment, filed August 8, 2016.....	11

In this contested proceeding, proponent Shirley Cahan has moved for summary judgment dismissing the objections—based on lack of testamentary capacity, fraud, undue influence and revocation—filed by Phyllis Brooks to the probate of an instrument dated May 14, 2009 (“the instrument”), as the Last Will and Testament of Harold D. Young.

The court has issued five prior decisions in this proceeding and familiarity with the background of this case is presumed. Previously, the court granted summary dismissal of the objection based on lack of due execution and ordered a continuance (CPLR 3212 [f]) to allow

objectant to conduct depositions (*Matter of Young*, NYLJ, Nov. 12, 2015, at 20, col 6 [Sur Ct, NY County]). Discovery has been completed and the parties have filed their respective supplemental papers in accordance with a schedule fixed by the court. Only facts and procedural history relevant to the present summary judgment motion on objectant's remaining objections are recited here.

Decedent died on September 28, 2013, at the age of 76, survived by two sisters (proponent and objectant) and four nieces and grandnieces as distributees. Decedent was an attorney and, according to proponent, he drafted the propounded instrument. The instrument, which is one page in length, provides that decedent's \$9.2 million estate be distributed as follows: \$1 million to Razel Canedo and the residuary estate to Steven Cahan, decedent's nephew and proponent's son. Proponent is the nominated executor and preliminary letters testamentary were issued to her on November 12, 2013.

The centerpiece of objectant's challenges to the validity of the propounded instrument is comprised of allegations about Canedo's conduct and her influence on decedent in connection with the execution of the instrument and decedent's failure to revoke or amend it.

Summary Judgment Standard

In a motion for summary determination, it is incumbent on the movant to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the opponent to produce proof sufficient to establish the existence of a material issue that requires a trial (*id.*; CPLR 3212

[b]). Summary judgment may be granted only where it is clear that no triable issue of material fact exists (*Alvarez*, 68 NY2d 320; *Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; see *Matter of MacGuigan*, NYLJ, Apr. 20, 2015, at 21, col 4 [Sur Ct, NY County]). In determining whether summary judgment is appropriate, the court “should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility” (*Dauman Displays v Masturzo*, 168 AD2d 204 [1st Dept 1990], citing *Assaf v Ropog Cab Corporation*, 153 AD2d 520 [1st Dept 1989]).

Testamentary Capacity

As the movant, proponent must make a prima facie case of testamentary capacity (*Matter of Roberts*, 34 Misc 3d 1213 [A] [Sur Ct, NY County 2011]). Testamentary capacity is an “individualized, contextualized” inquiry into a testator’s “task specific functionality” at the time the will was executed (*Matter of Khazaneh*, 15 Misc 3d 515, 520 [Sur Ct, NY County 2006]), and capacity is measured by whether the testator: (1) understood the nature and consequences of executing a will; (2) knew the nature and extent of his or her property being disposed of; and (3) knew the natural objects of his or her bounty (*Matter of Kumstar*, 66 NY2d 691 [1985], rearg denied 67 NY2d 647 [1986]).

Proponent has made a prima facie showing that decedent possessed the requisite testamentary capacity. Proponent is aided in this regard by the presumption in favor of capacity created by the attesting witnesses’ affidavits (*Matter of Leach*, 3 AD3d 763 [3d Dept 2004]). Additionally, in her affidavit in support of the motion, proponent avers that at no time in his life did decedent ever suffer from a cognitive impairment. In the words of proponent, decedent was

“sharp as a tack,” and, almost every day, she and decedent discussed the stock market, one of decedent’s passions. These discussions continued up until a week before decedent died in September 2013, more than four years after he executed the propounded instrument. Consistent with this portrayal, one attesting witness testified at her deposition that, at the time of execution, decedent was “very vibrant” and “looked perfect.”

Objectant has proffered no evidence that raises a question as to decedent’s testamentary capacity at the time the will was executed. To the contrary, at her deposition, objectant herself depicted decedent as an “astute” and savvy investor, and as an avid art collector who lived independently, and talked to objectant weekly on the phone about the stock market and politics. Accordingly, the objection upon the ground of testamentary capacity is dismissed.

Undue Influence or Duress¹

Movant here also bears the burden of establishing a prima facie case that the propounded instrument is a natural will rather than the product of undue influence (*Matter of MacGuigan*, NYLJ, Apr 20, 2015, at 21, col 4 [Sur Ct, NY County]). If that burden is met, in order to resist summary dismissal, objectant must raise an issue of fact by proffering evidence of the elements

¹ Although not pled in her objections, the affirmation of objectant’s counsel in opposition to the instant motion argues duress or coercion as a ground for the objection. Counsel asserts: “[T]he facts support the ‘premise’ that Canedo exercised duress and/or coercion over the will of the decedent as a partner in the crimes for which she was convicted and served time in prison. . . . It is submitted that the court should consider the fact of duress and/or coercion to be dealt with at trial and not properly disposed of by summary judgment motion.” Duress is considered a category of undue influence (*Matter of Rosasco*, 31 Misc 3d 1214 [A], 2011 NY Slip Op 50673[U], *9 [Sur Ct, NY County 2011]) and “in the context of wills, [duress] may be defined as the use of coercion or force to such a degree that it destroys the free agency and willpower of the testator” (*id.* *10, quoting Ronald J. Scalise, Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 Duke J. Comp. & Int’l L. 41 [2008]).

of undue influence: motive, opportunity, and actual exercise of undue influence (*id.*, citing *Matter of Walther*, 6 NY2d 49 [1959]). The influence must amount to “a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist” (*Children’s Aid Soc. v Loveridge*, 70 NY 387, 394 [1877]).

Movant has met her initial burden of making a prima facie showing that the instrument is a “natural will.” In contrast to the classic image of a testator who falls victim to undue influence—mentally infirm, dependent, and isolated (*Matter of Bogen*, NYLJ, Nov. 13, 2014, at 22, col 3 [Sur Ct, NY County]), the record reflects that decedent was in control of his life and kept living independently even after he was diagnosed with leukemia, years after executing the propounded instrument. According to proponent, decedent was an attorney who knew the laws relating to trusts and estates and regularly drafted wills for his clients during his 50-year practice of law. One attesting witness testified that, on May 14, 2009, decedent, alone, brought the instrument to the lobby of the building where he maintained his office for over 20 years, told two building employees that he wanted to execute his will, and asked them to act as witnesses. Proponent states that, shortly after decedent had executed his will, he notified her that he was putting the will in his safe deposit box, sent her the key to the box, and asked her to sign cards provided by the bank so that she would have access to the box.

Furthermore, the dispositions under the propounded instrument appear to be natural: decedent made a gift to Canedo, a long-time friend or romantic partner whom decedent had

brought to celebrate Thanksgiving with his family and for whom decedent provided some limited support during his lifetime, while leaving the majority of his assets to a nephew with whom he had a relationship.

Objectant is correct that undue influence may be proved by circumstantial evidence (*Matter of Walther*, 6 NY2d at 54). However, in order to establish that a genuine issue of material fact exists requiring trial as to undue influence, objectant must submit proof that is “specific and detailed, substantiated by evidence in the record” (*Matter of O’Hara*, 85 AD2d 669, 671 [2d Dept 1981]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v City of New York*, 49 NY 2d 557, 562 [1980]).

Objectant’s main contention is that the bequests in the propounded instrument are the product, not of decedent’s free will, but of duress. According to objectant, Canedo threatened decedent to make him leave a gift to her in his will.² In essence, objectant asserts that decedent executed his will out of fear that Canedo would implicate him in criminal activity that was the subject of a federal investigation at the time decedent executed the instrument and for which, later, Canedo was convicted and served prison time. Objectant claims that even after Canedo’s

² The objections allege that proponent, Steven Cahan, Canedo, or some other person unduly influenced decedent. However, in her supplemental papers in opposition to the motion, objectant addresses only duress or undue influence allegedly perpetrated by Canedo and no one else. The court concludes that objectant has abandoned her claims of undue influence allegedly exercised by anyone other than Canedo (*see Wilmington Trust Co. v Burger King Corp.*, 10 Misc 3d 1053[A], 2005 NY Slip Op 51943[U] [Sup Ct, NY County 2005] [claim deemed abandoned when plaintiff failed to address it in opposition to defendant’s motion for summary judgment]).

conviction, decedent's fear lingered and prevented him from changing his will.³ The proof submitted by objectant in support of these statements includes Canedo's deposition testimony, objectant's affidavit and another of Valerie Hume, a long-time friend and ex-girlfriend of decedent's.

The undisputed timeline of events supports the conclusion that, in May of 2009, Canedo could not have, through threats of implicating him in criminal activity, induced decedent to make a bequest to her that he would not have made otherwise. According to the press release from the U.S. Attorney's Office for the Southern District of New York, Canedo was arrested on or around February 1, 2010—more than eight months after decedent executed the propounded instrument—and charged with mail and wire fraud for allegedly operating a Ponzi scheme from January 2003 to July 2008. Objectant has provided no evidence from which the court could conclude that Canedo was aware of the government's investigation of her activities prior to her arrest.⁴

The allegations in objectant's affidavit concerning Canedo's conduct are perfectly coordinated sentence-by-sentence with those in Hume's affidavit but are not based on personal knowledge and are mere expressions of objectant's beliefs, surmise and conclusions. When questioned at her deposition, the best evidence objectant could provide was that "I really feel" that Canedo influenced decedent and possibly threatened him. Such speculative assertions,

³ Even if objectant's claim is accepted as true, this fear would explain decedent's keeping his will intact as to the bequest to Canedo but not his decision not to change his will to benefit objectant.

⁴ The only evidence on this point is Canedo's deposition testimony—provided by objectant herself—that Canedo did not know prior to her arrest that she was being investigated.

without more, fail to raise an issue of fact as to motive, opportunity, and actual exercise of undue influence.

For her part, Hume asserts:

“THAT on May 14, 2009, at the time of said will’s purported execution, Razel Canedo exerted undue influence over the decedent to make the distributions in the manner he did.

THAT on May 14, 2009, at the time of said will’s purported execution, Razel Canedo pressured the decedent Harold D. Young against his own free will to sign said instrument in the manner it was executed. . . .

THAT on May 14, 2009, at the time of said will’s purported execution, Harold D. Young executed said purported instrument in fear that Razel Canedo would implicate him in the ongoing Federal Prosecution of their fraudulent schemes. . . .

THAT after signing the purported instrument on May 14, 2009, Harold D. Young told me on numerous occasions that he wished to change his will, leaving a portion of his estate to his sister Phyllis Brooks who he loved and who was his primary caregiver as he grew sicker.

THAT after signing the purported instrument on May 14, 2009, Harold D. Young told me on numerous occasions that he feared if Razel Canedo discovered he had changed the terms of the purported May 14, 2009 will Razel Canedo would implicate him in a number of Federal Crimes and he would lose his license to practice law and face incarceration.”

Hume’s statements are as conclusory as objectant’s. The basis for Hume’s assertions is said to be her personal knowledge derived from her relationship with decedent, but Hume does not state in her affidavit how often she spoke with decedent or when they last spoke. After scrutinizing objectant’s and Hume’s affidavits carefully, in the light most favorable to objectant, the court concludes that such evidence does not raise a bona fide and material issue requiring a trial (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Furthermore, objectant’s claim that the bequest to Canedo is unnatural or only the reflection of duress or her undue influence over decedent is not supported by the proof. The

nature of decedent's relationship to Canedo is not absolutely clear from this record. Proponent avers that decedent and Canedo were "intimate partners" for about 10 years—a fact that appears to be corroborated at least in part by the content of letters Canedo sent to decedent while she was incarcerated.⁵ Objectant for her part depicts their relationship as nothing beyond a business partnership—in which decedent "financed" several of Canedo's "businesses" that decedent at some point described as "very lucrative." Neither objectant's characterization of the relationship nor Canedo's conviction of a crime alone raises a suspicion that the bequests in the propounded instrument—including the one million dollars to Canedo—were the products of anything but decedent's wishes. Nor does the relationship between decedent and Canedo bear any resemblance to the extraordinary relationship involved in *Matter of Anna* (248 NY 421 [1928] [mentally impaired decedent from whom a natural object of bounty was isolated as a result of criminal complaint brought by major beneficiary of will may have been unduly influenced to disinherit all of his children other than one purported child born during his relationship with major beneficiary]), a case cited by objectant.

Objectant attempts to draw an analogy to the facts in *Matter of Rosasco* (31 Misc 3d 1214 [A]), in which the court declined to dismiss summarily an undue influence objection after concluding that evidence of several instances of threat of violence by proponent created a genuine question as to undue influence or duress. However, other than objectant's and Hume's conclusory statements, there is no proof before the court that decedent was under duress or being threatened in any way or had felt threatened at any point in time. The only evidence presented in

⁵ Objectant did not dispute that Canedo wrote these letters.

this connection by objectant is that decedent might have invested in Canedo's businesses and such fact, even if true, provides no proof that Canedo had any means to exert undue influence on decedent.

The court will assume, for the sake of argument, that decedent might have feared Canedo's somehow learning of a change in his will despite his wish that she not be apprised of it. For the same purpose, the court will accept the further proposition that decedent would have exposed his vulnerability to ex-girlfriend Hume. Nevertheless, this evidence fails to create a genuine issue of fact as to duress, since a threat to do something or to refrain from doing something does not per se amount to duress if the threat was "to do an act that the wrongdoer had a right to do" (Restatement [Third] Property: Wills and Other Donative Transfers § 8.3, Comment *i*). In contrast, "[a] donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made" (*id.* § 8.3 [c]; *cf. Matter of Rosasco*, 31 Misc 3d 1214 [A]). The record here lacks evidence of any wrongful act by Canedo. According to objectant's theory, decedent and Canedo were involved together in criminal activity. Implicating decedent in crimes that were part of "their fraudulent schemes"—had Canedo done so or threatened to do so or told decedent that she was planning to do so—is an act that Canedo had the legal right to do.

In sum, the claim that decedent might have invested in Canedo's businesses and that he might have been vulnerable as a result of such investment, even if accepted as true, is too

attenuated to raise a question of fact as to whether the propounded instrument is the product of duress. Accordingly, the objection based on undue influence or duress is dismissed.

Fraud and Revocation

With respect to the fraud objection, objectant has failed to plead the elements of this claim with particularity as required by CPLR 3016 (b). An allegation that the propounded instrument was procured by fraud is made in the objectant's pleading, but no allegation that Canedo or any other individual made a false statement to decedent, or even surmise that someone made such statements, is presented on the pleading on this record. In the absence of any specification as to the identity of a perpetrator or the making of a false statement, the motion for summary dismissal of the objection based on fraud is granted.


The objectant's opposition to the instant motion is silent as to the objection on the ground of revocation, which was interposed among numerous claims in the pleading. Accordingly, any such objection is deemed abandoned (*Wilmington Trust Co. v Burger King Corp., supra*) and summary dismissal is granted.

CONCLUSION

Based on the foregoing, proponent's motion for summary judgment is granted. All objections are dismissed and the propounded instrument shall be admitted to probate.

Settle decree.

Dated: March 17, 2017



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